

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:)	Bankr. No. 03-10194
)	Chapter 11
TRI-STATE ETHANOL COMPANY, LLC)	
Tax I.D. No. 46-0449270)	
)	
Debtor.)	
)	
NORTH CENTRAL)	Adv. No. 03-1032
CONSTRUCTION, INC.)	
)	
Plaintiff,)	
)	
-vs-)	
)	
TRI-STATE ETHANOL)	
COMPANY, LLC; FIRST DAKOTA)	
NATIONAL BANK; SOUTH DAKOTA)	DECISION RE: DEFENDANT
CORN UTILIZATION COUNCIL;)	FIRST DAKOTA NATIONAL BANK'S
SOUTH DAKOTA BOARD)	AND PLAINTIFF'S CROSS-MOTIONS
OF ECONOMIC DEVELOPMENT;)	FOR PARTIAL SUMMARY JUDGMENT
WILLIAM F. MURPHY)	
SELF-DECLARATION OF TRUST AND)	
MIKE D. MURPHY; DETERMAN)	
BROWNIE, INC.; INTERSTATES)	
ELECTRIC & ENGINEERING)	
CO., INC.; D & W INDUSTRIES,)	
INC.; J & D CONSTRUCTION, INC.;)	
GAYLOR ENGINEERING; WEBSTER)	
ENGINEERING & MFG. CO. ;)	
RENTAL SERVICE CORPORATION;)	
MARTINEK LUMBER;)	
RONNING ENGINEERING CO., INC.;)	
ROBERTS COUNTY;)	
KLEIN NATIONAL BANK;)	
and PEOPLES STATE BANK,)	
)	
Defendants.)		

The matters before the Court are the Motion for Partial Summary Judgment Regarding Lien Priorities filed by Defendant First Dakota National Bank, the Cross-motion for Partial Summary Judgment filed by Plaintiff North Central Construction, Inc., and the several related responses, briefs, and affidavits.

These are core proceedings under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions on the issues raised in the cross-motions pursuant to Fed.R.Bankr.P. 7052.

This Decision is limited to the impact of the several lien waivers signed by North Central Construction, Inc., Ronning Engineering Company, Inc., and Interstates Electric & Engineering Company, Inc., on the priority of their mechanics' liens and the real property mortgage held by First Dakota National Bank.¹ As set forth below, Defendant First Dakota National Bank's motion will be denied and Plaintiff North Central Construction, Inc.'s motion will be granted in part.

I.

Several investors united to build an ethanol plant in Roberts County, South Dakota. The entity formed to build and run the plant is known as Tri-State Ethanol Company, L.L.C. ("Tri-State Ethanol").

First Dakota National Bank. On October 27, 2000, First Dakota National Bank ("Bank") issued a commitment letter to Tri-State Ethanol that it would provide a construction and term loan

¹ Excluding Defendant-Debtor Tri-State Ethanol Company, L.L.C., all the other defendants in this adversary proceeding also claim to hold a mechanics' lien, mortgage, or other encumbrance on the ethanol plant's property. The validity and priority of these other encumbrances are not addressed in this Decision.

for \$9,000,000. The letter indicated the Bank was to have a first lien position on the ethanol plant's real and personal property.

On May 14, 2001, Tri-State Ethanol signed a "Business Loan Agreement" with the Bank. That day, Tri-State Ethanol gave the Bank a blanket security interest in the ethanol plant's business personalty. A financing statement regarding that security interest was filed with the South Dakota Secretary of State on May 15, 2001. Tri-State Ethanol also gave the Bank a mortgage on its real property on May 14, 2001, and recorded it in Roberts County on May 15, 2001.²

According to Daniel L. Swanda, Vice President of the Bank, the Bank released the first funds for the construction project sometime in August 2001. Tri-State Ethanol signed the actual note for the \$9,000,000 construction loan from the Bank on March 15, 2002. Tri-State Ethanol renewed the Bank's secured interest in its business personalty and gave the Bank another mortgage on the Roberts County real property. The mortgage was recorded March 15, 2002.

First Dakota Title Company ("Dakota Title") served as the

² When the Bank recorded its first mortgage on May 15, 2001, the real property was actually owned by Daniel, Richard, Raymond, and Robert Foltz. The Foltzes conveyed the land to Tri-State Corn Processors Cooperative on March 5, 2002, and Tri-State Corn Processors Cooperative sold the land to Tri-State Ethanol on March 7, 2002. Both conveyances were recorded on March 7, 2002.

escrow agent for the distribution of funds from the Bank. In a November 3, 2000, letter to the Bank and Tri-State Corn Processors Cooperative, one of the investors in the plant, Dakota Title set forth its anticipated procedures for issuing funds and receiving lien waivers in return. As stated in the letter and in some affidavits of record, it was Dakota Title's clear intent that the lien waivers would insure that the Bank's mortgage was the encumbrance of first priority on the ethanol plant's realty. Neither the Bank nor Dakota Title obtained subordination agreements from any of the contractors or subcontractors who had worked at the plant site before the Bank's mortgage was recorded.

North Central Construction, Inc. North Central Construction, Inc., ("North Central") was retained as the general contractor to build the ethanol plant. It was also an investor in the project. According to its company representatives, North Central furnished its first labor or materials at the plant construction site on October 12, 2000. A contract between Tri-State Ethanol and North Central, however, was not signed until December 27, 2000.

During the course of construction, North Central presented Dakota Title with several invoices for payment. The invoices reflected a request for payment that, in general, excluded a 5% retainage, which was required under North Central's contract with Tri-State Ethanol. The invoices also generally excluded

costs related to 41 change orders dated between March 6, 2002, and July 9, 2002.

North Central signed several lien waivers that corresponded to most of the invoices it issued. They were each entitled "PARTIAL RELEASE AND WAIVER OF LIEN." The last waiver was dated May 31, 2002, and provided, in pertinent part:

The undersigned has been employed by Tri-State Ethanol Company LLC, P.O. Box 76, Roshol, SD 57260 to furnish labor or materials for the building known as Tri-State Ethanol Company LLC Plant situated on the above-described property near the City of Roshol, County of Roberts, in the State of South Dakota.

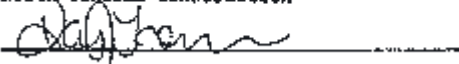
NOW, THEREFORE, in consideration of the payment of Three Hundred Seventy One Thousand Three Hundred Eighty Nine Dollars and Ninety Four Cents (\$371,380.94) and other good and valuable consideration, upon the receipt thereof, the undersigned does hereby waive and release any and all lien, claim or right of lien on the above described building and real estate under the laws of the above described state on account of labor, services, or materials furnished by the undersigned to or on account of said building or real estate up to and including the 28th day of February, 2002.

North Central did not receive the payment referenced in this waiver.

Dakota Title did not like the lien waivers submitted by North Central. It furnished new lien waiver forms that North Central also signed. They were each entitled "WAIVER OF LIEN" and were addressed "TO WHOM IT MAY CONCERN AND TO FIRST DAKOTA NATIONAL BANK AND FIRST DAKOTA TITLE[.]" These waivers provided, in pertinent part:

For good and valuable consideration, receipt of which is hereby acknowledged, the undersigned hereby waives and releases any and all mechanics' liens, claims or rights of liens and all rights acquired by the undersigned to file mechanics' liens or claims upon the real property situated in the County of Roberts, State of South Dakota, described as:

[description omitted]

on account of labor or services performed at or materials furnished or
delivered to the real property above described or any building, construction
or improvement thereon by the undersigned as of 1/31/02.
Dated this 9 day of April, 2002.
AMOUNT: \$ 500,000.00 North Central Construction


The waiver above, dated April 9, 2002, and referencing labor and materials furnished through January 31, 2001, was one of the last ones signed by North Central on Dakota Title's form. The other, also dated April 9, 2002, for labor and materials furnished through January 31, 2001, referenced a payment of \$223,663.48.

Though the wording of the two release forms was not identical, the biggest difference was that the title on North Central's form included the word "partial," while Dakota Title's form did not. Both forms stated the waiver was being given in consideration for a stated sum and that the waiver was for materials and labor through a stated date.³ Neither indicated they were a final waiver issued at the completion of the payee's work.

The last payment that North Central received was on April 10, 2002. North Central filed a mechanics' lien statement in Roberts County on August 13, 2002. Therein, North Central said it was still owed \$1,663,120.80 as of July 30, 2002. This sum represented unpaid invoices from contract work and change orders

³ Amounts and dates were left blank when North Central signed some of the lien waivers on Dakota Title's forms.

dated principally on or after April 1, 2002. In the lien statement, North Central further stated it had made its last contribution at the plant on or after July 15, 2002. Affidavits filed with the Court by North Central's representatives indicate North Central's work on the plant continued at least to sometime in July 2002.

North Central filed an amended mechanics' lien statement on December 31, 2002, and stated it was owed \$3,457,447.28 as of December 12, 2002. This sum included \$1,663,120.80 from the original mechanics' lien statement and \$1,758,325.00 in additional billings and costs through December 12, 2002. In the amended statement, North Central stated it had completed its work on the project on or after October 4, 2002.

Ronning Engineering Company, Inc. In mid-December 2000, Tri-State Ethanol and Ronning Engineering Company, Inc., ("Ronning") contracted for Ronning to furnish a drying system for the ethanol plant. Ronning commenced its work at the project site on March 23, 2001, when a piece of equipment was delivered.

Ronning received interim payments through Dakota Title and signed corresponding lien waivers on forms supplied by Dakota Title. The lien waivers were identical to the ones signed by North Central on Dakota Title's form. The date of the last lien waiver signed by Ronning was December 31, 2001, for materials and labor provided as of December 31, 2001.

Ronning concluded its work at the plant on December 20,

2002. It has been paid \$335,745.20 to date. Ronning filed a mechanics' lien statement on March 4, 2003, for \$84,921.27, plus interest from September 1, 2002. According to the affidavits of its company representatives, the sum reflected in the March 4, 2003, mechanics' lien statement was entirely for services rendered after December 31, 2001, when it signed the last of its lien waivers.

Interstates Electric & Engineering Company, Inc. On April 2, 2001, Interstates Electric & Engineering Company, Inc., ("Interstates") entered into a contract with North Central to provide electrical engineering, electrical construction, and control systems for the ethanol plant. Interstates was to be paid \$1,600,000.00 for its work. The contract provided for interim payments less a 5% retainage. Interstates commenced work on the project on November 14, 2000, before the contract was signed.

Interstates received periodic payments during construction for its work and materials. In tandem with these payments, Interstates signed lien waivers on forms supplied by North Central. One such waiver has been made a part of the record.⁴ It acknowledged Interstates was receiving consideration of \$97,337.52 for materials and labor furnished through March 31,

⁴ For purposes of this decision, the Court presumes this was the last waiver signed by Interstates. The record is not clear on how many waivers were actually signed by Interstates or when.

2002. It is dated March 31, 2002. The waiver is similar in form to the original waivers signed by North Central on its own form except that Interstates' waiver contains an additional paragraph, which provides:

THE UNDERSIGNED REPRESENTS AND WARRANTS THAT THERE ARE NO SUBCONTRACTORS, SUPPLIERS, MATERIALMEN, OR OTHER PERSONS WHO HAVE OR MAY CLAIM TO HAVE ANY RIGHT TO A MECHANIC'S LIEN ON THE ABOVE DESCRIBED REAL ESTATE OR BUILDING ON ACCOUNT OF ANY WORK, SERVICES, OR MATERIALS PERFORMED OR FURNISHED BY THE UNDERSIGNED. THE UNDERSIGNED FURTHER REPRESENTS AND WARRANTS THAT ALL SUBCONTRACTORS, SUPPLIERS, AND MATERIALMEN OF THE UNDERSIGNED HAVE BEEN PAID IN FULL UP TO AND INCLUDING THE EFFECTIVE DATE OF THIS PARTIAL RELEASE AND WAIVER.

Interstates completed its work at the ethanol plant on July 15, 2002. It filed a mechanics' lien in Roberts County on August 12, 2002, claiming it was still owed \$578,864.08, plus accruing interest at 18%. David Crumrine, president of Interstates, affirmed that Interstates never received the compensation referenced in the March 31, 2002, waiver.

Construction of the plant was sufficiently completed so that production at the plant began sometime in 2002. Tri-State Ethanol, however, did not pay all the contractors and subcontractors in full for the construction and start-up work. The plant was shut down in November 2002 for maintenance. An explosion occurred at the plant on December 31, 2002, while it was still shut down. Tri-State Ethanol used insurance proceeds during 2003 to repair the damage, but the plant has not resumed production. Litigation to sort out the various unpaid claims was commenced in state court. Before final resolution of the state court litigation, Tri-State Ethanol ("Debtor") filed a

Chapter 11 petition in bankruptcy on May 23, 2003.

On July 14, 2003, North Central commenced this adversary proceeding to determine the validity, priority, and extent of the many encumbrances on Debtor's realty in Roberts County. At the agreement of the majority of parties, the Bank filed a motion for partial summary judgment on December 19, 2003, so that the Court could assess the impact of the lien waivers signed by North Central, Ronning, and Interstates. North Central filed a cross-motion for partial summary judgment. Briefs and affidavits were received, and the matter was taken under advisement.

In its first brief in support of its motion for partial summary judgment, the Bank argued that the lien waivers signed by North Central, Ronning, and Interstates in effect gave the Bank's mortgage priority over these three creditors' mechanics' lien for all work performed by the contractor and subcontractors through the dates certain stated in the lien waivers, rather than just to the extent of the payment amount set forth in the lien waivers. As to North Central's and Ronning's mechanics' liens, the Bank further argued that these creditors, through the lien waivers, had disclaimed their ability to file a mechanics' lien in the future. The Bank cited several cases from other jurisdictions in support of its arguments.

In its reply brief, the Bank clarified that it did not contend that any of the lien waivers precluded the contractor or subcontractor from filing lien waivers for services rendered

after the date specified in the last waiver, and it conceded that Ronning had a valid lien for its work after December 31, 2001, though it did not agree when Ronning's lien attached. In its reply brief, the Bank also raised for the first time the argument that North Central and Interstates had waived their right to file any mechanics' liens through a contract provision that obligated North Central to keep the ethanol plant realty free of mechanics' liens.

In its briefs, North Central argued that the lien waivers it signed were only effective for the sums paid and that the lien waivers did not alter the original October 12, 2002, date when its mechanics' lien first attached. North Central further argued that any ambiguity in the lien waivers had to be construed to its benefit, not the Bank's. Finally, North Central disputed that its contract with Debtor constituted a waiver of its right to file any mechanics' lien.

In its briefs, Ronning did not take a clear stand on whether it had waived any lien for services performed or materials provided before December 31, 2001, the date of its last lien waiver. Ronning, however, clearly argued that its mechanics' lien for its remaining claim relates back to the commencement of its work on the plant site.

In its briefs, Interstates stated the March 31, 2002, lien waiver it signed was ineffectual because it never received the consideration stated in the waiver. It also argued that any lien

waivers it signed earlier than March 31, 2002, would not have altered the date that its mechanics' lien first attached. Further, Interstates disputed the Bank's contention that the "keep realty free of liens" provision in North Central's general contract applied to it as a subcontractor.⁵

II.

Summary judgment. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c)). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992) (quoting therein *Matsushita Elec. Industrial*

⁵ In their briefs, other participating defendants joined one side of the waiver argument or the other. Defendant South Dakota Board of Economic Development, siding with the Bank, also argued that North Central, Ronning, and Interstates were estopped from claiming that their mechanics' liens are superior to the Board of Economic Development's mortgage because the lien claimants "either knew or should have known that those waivers would be relied upon by the lenders funding the project." The lien position of the Board of Economic Development's mortgage is not addressed in this Decision.

Co. v. Zenith Radio, 475 U.S. 574, 587-88 (1986), and citations therein). Where motive and intent are at issue, disposition of the matter by summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

The movant meets his burden if he shows the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273 (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (citation therein); *Handeen*, 112 F.3d at 1346. If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d at 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

*Mechanics' liens in South Dakota.*⁶ In South Dakota, contractors and subcontractors are given a lien on any real property on which they furnish labor or materials. S.D.C.L. § 44-9-1.⁷ See generally *Craig v. Swann (In re Swann)*, 141 B.R. 678, 683-87 (Bankr. D.S.D. 1992)(Ecker, J.). The purpose of South Dakota's mechanics' lien laws is to "provide security or protection to persons who improve the property of others by furnishing materials and labor." *Lytle v. Morgan*, 270 N.W.2d

⁶ As noted in *Craig v. Swann (In re Swann)*, 141 B.R. 678, 686 (Bankr. D.S.D. 1992)(Ecker, J.)(cite therein), case law from other jurisdictions regarding mechanics' liens is unreliable because those decisions arose under another state's particular statutes, not South Dakota's.

⁷ S.D.C.L. § 44-9-1 provides, in pertinent part:

Whoever shall, at the request of the owner or the duly authorized agent or representative of the owner, or of any contractor or subcontractor, furnish skill, labor, services, including light, power, or water, equipment, or materials for the improvement, development, or operation of property as hereinafter specified, shall have a first lien thereon and the appurtenances thereto, prior and superior to all other liens except those of the state or of the United States, and except existing liens, mortgages, or other encumbrances then of record or of which the lien claimant has actual notice, for the price or value of the same, so furnished, subject to the further provisions of this chapter, as follows:

(1) For the erection, alteration, repair, or removal of any building, fixture, bridge, fence, or other structure or for grading, filling in, or excavating the same, or for digging or repairing any ditch, drain, well, cistern, reservoir, or vault thereon or for laying, altering, or repairing any sidewalk, curb, gutter, paving, sewer, pipe, or conduit in or upon the same or in or upon the adjoining half of any highway, street, or alley upon which the property abuts, a lien upon the said improvement and the land on which it is situated, or to which it may be removed[.]

359, 361 (S.D. 1978). South Dakota's mechanics' lien

provisions should receive a liberal construction, to the end that the intention of the legislature may be carried out, and substantial justice be done to all parties who may be affected by its provisions[.]

Hill v. Alliance Building Co., 60 N.W. 752, 754 (S.D. 1984).

A mechanics' lien attaches from the first material delivered or work performed at the job site. S.D.C.L. § 44-9-7.⁸ The lien attaches to the actual structure being built or improved and also to the land on which the structure is located. *Amert Construction Co. v. Spielman*, 331 N.W.2d 307, 311 (S.D. 1983)(citing *Atlas Lumber Co. v. Semmler*, 205 N.W. 376 (S.D. 1925)). The lien does not serve as a substitute for the debt but instead is a security interest given to aid the satisfaction of the debt. *Lytle*, 270 N.W.2d at 361. The value or "sum" of the statutory lien against the owner for work done under contract with the owner is the agreed contract amount plus the costs for any additional materials or work to which the parties agreed.

⁸ S.D.C.L. § 44-9-7 provides:

Such lien as against the owner of the property shall attach and take effect from the time the first item of material or labor is furnished upon the premises by the lien claimant, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lien holder had actual notice thereof.

S.D.C.L. § 44-9-6.⁹ The value or "sum" of the statutory lien against all others than the owner is for the "reasonable value of the work done, and of the skill, material, and machinery furnished" by the contractor or subcontractor. *Id.*; *Hoffman v. Olsen*, 658 N.W.2d 790, 793 (S.D. 2003). The party asserting the lien has the burden to prove the amount. S.D.C.L. § 44-9-40.

The statutory mechanics' lien continues while the contractor or subcontractor works on the project. For the lien to continue after the contractor or subcontractor finishes his work or completes his contribution of material or equipment to the project, the contractor or subcontractor must file a lien statement with the register of deeds in the county where the project is located. S.D.C.L. § 44-9-15.¹⁰ The lien statement must substantially comply with requirements set forth in S.D.C.L.

⁹ S.D.C.L. § 44-9-6 provides:

If the contribution be made under a contract with the owner and for an agreed price, the lien as against him shall be for the sum so agreed upon together with the cost of any additional material or work agreed upon, otherwise, and in all cases as against others than the owner, it shall be for the reasonable value of the work done, and of the skill, material, and machinery furnished.

¹⁰ S.D.C.L. § 44-9-15 provides:

The lien shall cease at the end of one hundred twenty days after doing the last of such work, or furnishing the last item of such skill, services, material, or machinery, unless within such period a statement of the claim therefor be filed with the register of deeds of the county in which the improved premises are situated, or of the county to which such county is attached for judicial purposes, or if the claim be under the provisions of subdivision 44-9-1 (2), with the secretary of state.

§ 44-9-16. *R & L Supply, Ltd. v. Evangelical Lutheran Good Samaritan Society*, 462 N.W.2d 515, 519 (S.D. 1990). The statement is sufficient if it notifies an "ordinarily intelligent and careful person" of the materials supplied or labor performed. *Id.*; *H & R. Plumbing & Heating, Inc. v. F.D.I.C.*, 406 N.W.2d 151, 153 (S.D. 1987). The statement must be filed within 120 days after the contractor or subcontractor completes his work or finishes his last item of material or machinery. S.D.C.L. § 44-9-15; *Black Hills Institute of Geological Research, Inc., v. Williams*, 88 F.3d 614, 616-17 (8th Cir. 1996). A single lien statement including all items may be filed where the process of construction and the delivery of items was reasonably continuous. *Botsford Lumber Co. v. Schriver*, 206 N.W. 423, 426 (S.D. 1925).

A mechanics' lien arising under S.D.C.L. ch. 44-9 or South Dakota's common law may be "expressly" waived through compliance with S.D.C.L. ch. 44-9A or through "all other means presently existing under law by which such liens may be waived." S.D.C.L. § 44-9A-1. A waiver occurs under the common law

where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts, does or forbears the doing of something inconsistent with the exercise of the right. ...[T]here must be a showing of a clear, unequivocal and decisive act or acts showing an intent to relinquish the existing right.

Action Mechanical, Inc. v. Deadwood Historic Preservation Commission, 652 N.W.2d 742, 749 (S.D. 2002)(multiple cites therein). A waiver, however, must be considered in light of the

state's long-standing proposition that a mechanics' lien should stand while the debt remains unpaid. *Hill v. Alliance Building Co.*, 60 N.W. 752, 754-55 (S.D. 1894); *Action Mechanical*, 652 N.W.2d at 754-55.

III.

In *Action Mechanical* the South Dakota Supreme Court considered the impact of lien waivers. The waivers, signed and dated by two different construction-related entities,¹¹ had the same provisional wording, which provided:

LIEN WAIVER

\$50,000.00 in corporate stock Deadwood, South Dakota
December 29, 1995

Received of Iron Horse Inn, Inc., a South Dakota corporation, a total of 50,000 shares of corporate stock, having a par value of \$50,000.00 and issued as follows:

\$0,000 shares issued to Dale D. Sheesley

said stock being partial payment of all demands for labor, services, machinery, tools, equipment or materials heretofore furnished to Iron Horse Inn, Inc. in connection with the construction, alteration, improvement, addition to or repair of the structure or improvement upon the south 100 feet of Lots No. 8, 9, 10, 11, and 12, Block No. 28, Original Town of Deadwood, which address is 21 and 27 Deadwood Street, City of Deadwood, County of Lawrence, State of South Dakota, and in consideration of the aforesaid payment the undersigned hereby waives, relinquishes and absolutely releases forever, all right to claim a mechanic's lien against the above described property which might accrue under the laws of the State of South Dakota by virtue of the aforesaid work done or material furnished prior to December 31, 1995.

The undersigned hereby testifies that this instrument is signed under no constraint as a free and voluntary act.

¹¹ The waiver set forth in text was signed and dated by Action Mechanical, Inc.; the other considered by the South Dakota Supreme Court was signed and dated by H & N Electric, Inc. Copies of these waivers were provided to the Court by the Lawrence County Clerk of Courts.

Though the wording on the three lien waiver forms presented in this case is not identical to that in the waivers considered in *Action Mechanical*, this Court can discern no meaningful difference in how they would be interpreted by South Dakota courts. While the actual waiver provision in each is broad because of the use of the terms "all" or "any and all," the forms all provide that the waiver is being given for labor or materials only through a certain date and for a stated consideration. There is nothing in the waivers to indicate that the "furnished by" or "as of" dates singularly reflect the contractor's or subcontractor's intent. Accordingly, this Court, guided by *Action Mechanical*, concludes that North Central, Ronning, and Interstates waived only that portion of their mechanics' lien that was actually paid. *Action Mechanical*, 652 N.W.2d at 754-55. This conclusion is consistent with South Dakota holdings that lien waivers must be resolved in favor of the lien, *id.* at 755 (citing generally *Metropolitan Federal Bank v. A. J. Allen*, 477 N.W.2d 668, 673 (Iowa 1991)), and with South Dakota policy that the purpose of a mechanics' lien in this state is to provide security for the contractor or subcontractor until the debt is paid in full. *Action Mechanical*, 652 N.W.2d at 754-55; *Hill*, 60 N.W. at 754-55.

When lien waivers are construed in the manner set forth in *Action Mechanical*, they are, in essence, like a receipt; that is, the contractor or subcontractor is acknowledging that he is being

paid a stated sum and that he therefore no longer has a mechanics' lien to the extent he is paid. See *Bruns v. Light*, 54 N.W.2d 99 (S.D. 1952). This interpretation is sound since a mechanics' lien serves as security to the extent of the debt. When a contractor or subcontractor is paid, the debt and thus the extent of the lien are reduced by the amount of payment. The waivers presented here, as in *Action Mechanical* and *Bruns*, did nothing more than acknowledge payment and the resultant reduction in the extent of the mechanics' lien. *Bruns*, 54 N.W.2d at 424. The waivers did not by themselves contractually extinguish a pre-existing right. *Id.*

A different conclusion is not warranted because the waivers on Dakota Title's form did not include "partial" in the title or body. Dakota Title's forms in no manner indicated they were a final lien waiver; they each, like the waivers on North Central's forms and the waivers considered in *Action Mechanical*, referenced a waiver only through a stated date for a sum certain. Moreover, the parties considered them partial waivers since Dakota Title continued to request that North Central sign new waivers as more interim payments were made and North Central abided by those requests.

There is no evidence that the Bank's mortgage should have a higher priority than North Central's, Ronning's, or Interstates' respective mechanics' lien because the mechanics' lien holders had actual notice of the Bank's mortgage. See S.D.C.L. § 44-9-7.

The first mortgage that Debtor gave the Bank was executed on May 14, 2001. No party could have had actual notice of the mortgage before the mortgage even existed.

There is no merit to the Bank's untimely argument that North Central and Interstates both waived their right to file any mechanics' lien because of a "keep free of liens" provision in North Central's contract with Debtor. The subject contract provision obligated North Central to do certain things to keep the ethanol plant property free of liens. The provision also gave Debtor certain remedies should any claimant file a lien. There is nothing in the language of the contract provision, however, that waived North Central's or any subcontractor's right to file a mechanics' lien.

There is also no merit to the Bank's broad argument that North Central should be estopped from claiming a mechanics' lien because North Central knew that the Bank was relying on the waivers to give the Bank a first lien position on Debtor's realty. While North Central certainly knew that the Bank would be a major secured lender in the project, and while it may even have known that the Bank sought from Debtor a first lien position on the realty, there is no evidence that North Central understood that the Bank was relying on the lien waivers to insure that its mortgage had priority over any mechanics' liens.

The Court further concludes that the attachment dates for North Central's, Ronning's, and Interstates' respective

mechanics' liens were not altered by any of the waivers. Nothing in the state's mechanics' lien statutes or case law explicitly or implicitly indicates that the attachment date established by S.D.C.L. § 44-9-7 advances to a new stated date when the contractor or subcontractor receives interim payments during the building project and waives his lien to the extent of the payments received by that stated date.

There are no factual disputes regarding when North Central, Ronning, and Interstates first began work or delivered materials to the plant site (October 12, 2000, for North Central; November 14, 2000, for Interstates, and March 23, 2001, for Ronning). Since those initial attachment dates have not changed, North Central's, Ronning's, and Interstates' respective mechanics' liens all attached before the Bank's mortgage attached to Debtor's real property, which was no earlier than May 15, 2001.¹²

The Court notes that Ronning provided some off-site services for Debtor on December 7, 2000, but those services did not result in the attachment of a mechanics' lien. Section 44-9-7 provides

¹² The Court does not herein render a decision on whether the Bank's mortgage attached on May 15, 2001. Debtor did not own the real property until March 7, 2002. See S.D.C.L. §§ 44-8-1.2 and 44-8-1.2; *Ainsworth v. Erck*, 388 N.W.2d 886, 887-88 (S.D. 1986)(mortgage does not attach if mortgagor does not have interest in property mortgaged); see *Grand Forks National Bank v. Minneapolis & N. Elevator Co.*, 43 N.W. 806 (Dakota 1889)(mortgage given before mortgagor has interest in the mortgaged property will attach when the mortgagor acquires an interest); see also S.D.C.L. §§ 57A-9-109(11) and 57A-9-203(b)(2).

that the lien attaches and takes effect "from the time the first item of material or labor is furnished *upon the premises* by the lien claimant[.]" This physical presence serves as notice to the public before a lien statement is filed. *Botsford Lumber Co. v. Schriver*, 206 N.W. 423, 427 (S.D. 1925). Ronning's off-site services would not have given the requisite public notice.

Based on the present record, there appears to be no dispute that Ronning completed its work for Debtor on December 20, 2002, and that it timely filed its mechanics' lien statement on March 4, 2003. There also appears to be no dispute that Interstates completed its work for Debtor on July 15, 2002, and that it timely filed its mechanics' lien statement on August 10, 2002.

The same does not appear to be true for North Central since there is a dispute over whether North Central's original and amended lien statements reflect substantially continuous work for Debtor. The present record, however, is insufficient for the Court to determine the date when North Central performed the last of its construction work or when it furnished the last item of material or machinery. The present record also is insufficient for the Court to determine whether only substantially continuous work was reflected on North Central's original and amended lien statements. If the parties cannot agree on these issues for the application of § 44-9-15 regarding North Central's lien statements, especially its amended statement, see *Sarles v. Sharlow*, 37 N.W. 748, 751-52 (Dakota 1888), an evidentiary

hearing will be necessary.

An order will be entered denying the Bank's Motion for Partial Summary Judgment Regarding Lien Priorities and granting, to the extent set forth above, North Central's Cross-motion for Partial Summary Judgment. A second pre-trial conference will be scheduled so that the Court and counsel may set the course for the resolution of the remaining issues in this adversary proceeding. In conjunction with that conference, a status conference on all pending matters in the main case will also be held.

Dated this 10th day of May, 2004.

BY THE COURT:

/s Irvin N. Hoyt
Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk
(SEAL)